229343

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 542 (Sub-No. 18)

REGULATION GOVERNING FEES FOR SERVICES

OPENING COMMENTS OF CONSUMERS UNITED FOR RAIL EQUITY

Robert G. Szabo, Executive
Director and Counsel,
Consumers United for Rail Equity
Michael F. McBride
Van Ness Feldman, PC
1050 Thomas Jefferson Street NW
Suite 700
Washington, DC 20007-3787
Telephone: (202)298-1800
Email: rgs@vnf.com
mfm@vnf.com

Attorneys for Consumers United for Rail Equity

April 19, 2011

OPENING COMMENTS OF CONSUMERS UNITED FOR RAIL EQUITY

In its Notice served February 15, 2011 in this proceeding, the Surface Transportation Board ("Board") sought comments on its proposal to lower the filing fee for complaints (other than those pertaining to rate challenges) to $350 from $20,600. Consumers United for Rail Equity ("CURE") hereby submits its Opening Comments in response to that proposal.

Interest of CURE and its Members

CURE is an incorporated, non-profit advocacy group with the primary objective of advocating federal rail policy favorable to rail-dependent shippers, many of whom are often referred to as captive rail customers or captive shippers. CURE is sustained financially by the annual dues and contributions of its members, who are individual captive rail customers and their trade associations. Included in CURE are electric utilities that generate electricity from coal, chemical companies, forest and paper companies, cement companies, agricultural entities, various manufacturers and national associations, including both trade associations and associations of governmental institutions whose members work to protect consumers. CURE members do, from time to time, consider filing, and some have filed, complaints challenging railroad practices as unreasonable. For those reasons, CURE and its members have a great interest in this proceeding.

Background

In its Notice (at 1-2), the Board explained its view of the statutory provisions governing its filing fees:

> The Board sets user fees in accordance with the Independent Offices Appropriation Act of 1952 (IOAA). The IOAA directs agencies

such as the Board to establish fees for specific services that it provides to identifiable recipients, so that the service provided may be "self-sustaining to the extent possible." 31 U.S.C. § 9701(a). The fees must be "fair" and be based on a variety of factors, including (but not limited to) the costs to the agency of each covered service, public policy or interest served, and the value of the service to the entity receiving it. 31 U.S.C. § 9701(b). The Board's fees transfer some of the cost of funding the agency from the general taxpayer to the entity receiving the benefit of a particular Board action.[1]

The Board acknowledged (*id.* at 2) that its filing fees do not have to be set at the full cost of the services provided by the Board, if setting the fees at full cost would have a "chilling effect" on filing meritorious pleadings:

> Historically, certain fees have been set at levels below the full cost. For example, fee sub-item 58(i), a petition for declaratory order involving a dispute over an existing rate or practice, and fee sub-item 58(ii), all other petitions for declaratory order, were held at $1,000 and $1,400, respectively, well below full cost to agency, to avoid any possible "chilling effect" that higher fees would have on access by shippers and consumers to the Board's adjudicatory process. See Regulations Governing Fees for Servs. Performed In Connection With Licensing and Related Servs., 1 S.T.B. 179, 199-200 (1996). Filing fees for formal complaints generally have been set based on a percentage of the full cost. Id. at 195-99. Since 2008, pursuant to Congressional directive, we have held the fees for all rate complaints at or below $350, the level of filing fees for complaints in district court. Fees for competitive access complaints and complaints seeking establishment of a common carrier rate are also below $350.[2]

The Board explained (*id.*) that it is troubled by the disparity in its filing fees:

---

[1] The Board noted (*id.* at 1 n.1) that "The fees established by the Board for specific services offset the Board's appropriated funding, and do not add to it." This demonstrates that charging shippers a fee for filing complaints or petitions with the Board does not assist the Board in performing its role in support of the public-interest

[2] The Board noted that "The Interstate Commerce Commission (ICC) previously defined a "chilling effect" as the level at which the filing fee represents a significant factor in determining whether to bring a complaint. *See Regulations Governing Fees for Servs. Performed in Connection With Licensing and Related Servs.*, 1 I.C.C. 2d 196, 198 (1984)."

> Thus, in our current fee structure, we have a large gap between the relatively low fees for most complaints and for petitions for declaratory orders and the $20,600 fee for all other formal complaints, a gap that is not good public policy. Therefore, the Board proposes to lower the fee for sub-item 56(iv) [all other formal complaints except competitive access] from $20,600 to $350. Under this proposal, the fee for sub-items 56(i) [full Stand-Alone Cost rate complaints] and 56(ii) [Simplified-SAC rate complaints] would be set at $350, and the fee for sub-item 56(iii) [Three Benchmark rate complaints], the most likely path to rate relief for small shippers, would remain at $150.

The Board then explained (*id.* at 2-3) its three-part rationale for reducing the filing fee for non-rate complaints to $350 from $20,600:

> We believe three sound public policy considerations call for the Board to set relatively low fees for filing a complaint. Under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress eliminated authority previously held by the ICC to initiate investigations of alleged illegal or unreasonable rates or practices.[3] As a result, the filing of a complaint by shippers or other entities is the Board's only mechanism for investigating and addressing potential rate violations or other unlawful practices.
>
> Second, it is possible that the relatively high fees for filing formal complaints under item 56(iv) – currently $20,600 – may be having a chilling effect on shippers and other entities seeking to bring a complaint to the Board. For example, over the past 10 years, our Rail Consumer

[3] CURE respectfully disagrees that the Board cannot initiate an investigation of a railroad practice. While the ICC's power to investigate or suspend a rate was removed in the ICCTA, the Board was at the same time provided with broad authority in 49 U.S.C. § 721 to carry out its authority under ICCTA. CURE believes that Congress intended that challenges to rates must be by complaint (see 49 U.S.C. § 10707(b)("When a rat for transportation by a rail carrier providing transportation subject to the jurisdiction of the Board under this part is challenged as being unreasonably high..."), but that, in all other respects, including with respect to unreasonable practices, the Board may act on its own initiative. Indeed, the Board instituted Ex Parte No. 661, *Rail Fuel Surcharges,* with respect to railroad fuel surcharges on its own initiative. *See* decision served March 14, 2006, slip op. at 2 ("We are holding this hearing based on the Board's authority to inquire into the management of railroads and to obtain information that is needed to carry out the statute that the Board administers. 49 U.S.C. 721(b)."). It is unnecessary to resolve this matter in this proceeding, but the point has been made by the Board elsewhere, and CURE did not want its silence to be construed as acquiescence in the Board's oft-stated position.

and Public Assistance unit has assessed hundreds of informal complaints related to service and demurrage, and although many have been successfully resolved, several that were unresolved did not become the subjects of formal complaints. While we presume that some of these cases were not brought before the Board for reasons unrelated to fees, the proposed fee amendment would minimize any chilling effect of high fees, and encourage outside parties to bring potential regulatory violations before the Board for adjudication.

Finally, the proposed amendment should result in better management of the Board's docket and use of Board resources. Maintaining comparatively low filing fees for petitions for declaratory orders, coupled with the high fee for complaints (other than rate or competitive access complaints) under fee item 56(iv), appears to have led parties to seek broad declarations by the Board rather than asking the Board to resolve individual complaints. In some cases, an individual complaint may have been preferable and the Board's fee structure should not be the deciding factor in a party's decision of what type of case to bring.

The Board explained (*id.* at 3) that it intends, in a future proceeding, to consider reducing the filing fees for declaratory order proceedings.[4] The Board also certified (*Id.*) "that the regulations proposed herein would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act,"[5] because the only effect of the Board's proposed action is to reduce the filing fee for non-rate complaints to $350.

---

[4] "While not part of the changes proposed here, we intend, in a future proceeding, to consider revising the fees for declaratory order proceedings to better reflect the cost of these proceedings to the agency. However, to encourage courts to continue to seek our advice, when appropriate, under the doctrine of primary jurisdiction, and so as not to unduly burden parties, we also intend to establish a new, comparatively low fee item for petitions for declaratory order that result from court referrals."

[5] *Id.* at 3.

Argument

I.

THE BOARD'S PROPOSAL IS GOOD PUBLIC POLICY.

CURE and its members have long complained about the Board's filing fees. No other federal regulatory agency (or State agency, so far as CURE is aware) has filing fees of more than a few hundred dollars for complaints. At the Federal Energy Regulatory Commission, for example, the filing fee for a complaint is zero. As the Board noted, Congress responded to the problems of shippers caused by the Board's high filing fees by reducing the filing fees for rate complaints, but it did not specifically address the filing fees for non-rate complaints in appropriations legislation in recent years.

At its September 15, 2010 hearing, however, the Senate Commerce, Science and Transportation Committee made clear its view that the Board should reduce its filing fees for non-rate complaints (*i.e.*, complaints challenging the unreasonableness of a railroad's practices). Chairman Rockefeller stated, in part:

> Today, I am releasing a staff report that documents just how well the big Class I freight railroads are doing these days.
>
> What this important report tells us is that the railroads are earning 12 and 13% profit margins, which puts them at the top of the Fortune 500. And they're just getting more profitable because they're raising their shipping prices by an average of 5% a year. But the railroads say different things depending on their audience.
>
> When they're talking to the Surface Transportation Board, Mr. Elliott's agency, they act like it's still 1980. They say they're barely making enough money to keep the lights on. But when they're on their quarterly calls with

> Wall Street investors, it's a very different story. These companies tout their high profit margins and their power to dictate prices to their customers. And at the same time they're telling Congress that they don't have enough money to invest in needed capital projects, they're using billions of dollars of their profits to reward their shareholders with dividends and stock buybacks. This is all happening at a time when shippers all over our country are paying more than their fair share to transport their goods to their customers – paying more because they have no other alternative.
>
> As I have said many times before, we need a rail system that works not just for the freight railroads, but for all – shippers, passengers, and consumers. Unfortunately, it has felt at times like the railroads – some much more than others – have attempted to delay this process, hoping that these reforms will die if they can only stretch the process out through the elections. I am proud that for the first time in 30 years, this Committee reported out a bill – in a bipartisan way – that would update our rail regulations to reflect the economic realities of 2010. This legislation may not be on the cover of all the newspapers in the country each and every day but its benefits for communities small and large throughout America cannot – and should not – be underestimated.

STB Chairman Elliott responded by testifying that the Board was going to propose action in three areas, two of which are the subjects of separate rulemaking proceedings – exemptions (Ex Parte No. 704) and Competition in the Railroad Industry (Ex Parte No. 705). CURE has submitted Comments in each of those proceedings. As for filing fees, the subject of this proceeding, Chairman Elliott testified:

> Third, I plan to take steps to make the agency more accessible to parties that need to file a complaint because of a violation of the law. In a recent decision, the Board stated that it would review the level of filing fees in complaint cases. It is vitally important to ensure that all valid claims are brought before the agency. Therefore, filing fees should not deter parties from bring disputes to the Board.

CURE strongly agrees with Chairman Elliott's testimony. We have long maintained that the Board's filing fees are far-too high and discourage shippers and other entities from bringing meritorious complaints to the Board. So far as

CURE is aware, no Member of Congress has urged the Board to maintain its high filing fees for non-rate complaints. Accordingly, we believe the Board is correct in concluding that it is appropriate, and in the public interest, to reduce substantially its filing fees for non-rate complaints.

A complaint challenging the "reasonableness" of a railroad's practices is, in fact, a complaint challenging the lawfulness of that railroad's actions. Rail shippers, labor unions, governmental entities, non-profit groups, and all other citizens should be encouraged, not discouraged, from filing complaints bringing alleged unlawful behavior to the government's attention. The Board's proposed reduction in the filing fee for non-rate complaints is, therefore, strongly in the public interest. As the Board correctly noted, "As a result, the filing of a complaint by shippers or other entities is the Board's only mechanism for investigating and addressing potential rate violations or other unlawful practices."

Accordingly, CURE and its members strongly support the Board's proposed action as a welcome change from the past.

II.

HIGH FILING FEES HAVE REDUCED THE NUMBER OF MERITORIOUS COMPLAINTS FILED WITH THE BOARD.

The Board is appropriately concerned that high filing fees discourage the filing of formal complaints with the Board. The experience of CURE and its members confirms the Board's belief. For example, in 2009 a CURE member filed an informal complaint with the Board's Office of Public Assistance,

Governmental Affairs, and Compliance, challenging the fact that a railroad had literally placed a lock on a rail switch to keep another railroad from having access to the shipper's spur into its plant. The railroad that placed the lock on the switch promptly removed it after inquiries from the Office, but we are quite certain that the shipper in question would not have spent $20,600 plus legal fees to pursue the matter formally.

CURE believes that many rail shippers are reluctant to spend the current substantial sum of money for a filing fee on complaints merely to ask the Board to determine if a railroad's practices are unreasonable. Accordingly, CURE believes the Board is correct in concluding that meritorious complaints are not filed with it because of the high cost of both filing and pursuing a formal non-rate complaint before the Board.

III.

CURE BELIEVES THAT THE BOARD IS CORRECT THAT THE TYPE OF PLEADINGS FILED WITH IT SHOULD NOT BE AFFECTED BY DIFFERING LEVELS OF FILING FEES.

The Board's third reason for its proposed change in the filing fee is the proper management of its docket (Notice at 3):

> Finally, the proposed amendment should result in better management of the Board's docket and use of Board resources. Maintaining comparatively low filing fees for petitions for declaratory orders, coupled with the high fee for complaints (other than rate or competitive access complaints) under fee item 56(iv), appears to have led parties to seek broad declarations by the Board rather than asking the Board to resolve individual complaints. In some cases, an individual complaint may have been preferable and the Board's fee structure should

not be the deciding factor in a party's decision of what type of case to bring.

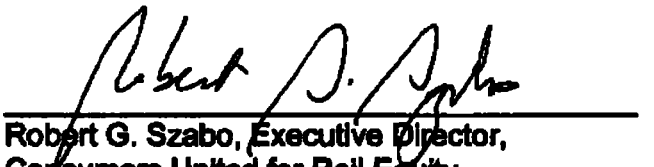
CURE completely agrees with the Board that filing fees should not be the determining factor in the type of pleading filed with the Board. It is certainly true that it can be preferable for the Board to resolve a complaint on the basis of unique facts, rather than to make broad policy determinations without knowing all of the circumstances of other parties who may or may not be similarly situated.

The Board is entitled to deference in how it manages its docket. *E.g., Vermont Yankee Nuclear Power Corp. v. NRC,* 435 U.S. 519, 555 (1978). Accordingly, CURE believes the Board's determination of the proper policy to best manage its docket is entitled to great deference. In any event, the Board is correct that filing fees should not determine the type of proceeding instituted before the Board. Rather, the subject matter of the dispute should be the sole determinant of the type of proceeding instituted before the Board.

Conclusion

CURE thanks the Board for its proposal to reduce the filing fee for unreasonable practice complaints to $350 from $20,600, and urges the Board to adopt that proposed reduction in filing fees as soon as it is able to do so.

Respectfully submitted,



Robert G. Szabo, Executive Director,
Consumers United for Rail Equity
Michael F. McBride
Van Ness Feldman PC
1050 Thomas Jefferson Street NW
Suite 700
Washington, DC 20007-3787
Telephone: (202)298-1800
rgs@vnf.com
mfm@vnf.com

April 19, 2011

Attorneys for Consumers United for Rail Equity